

THE SUMMARY JUDGMENT*

CHARLES E. CLARK**

THE RECENT spread of the summary judgment procedure in American practice may be traced in substance to the impetus afforded by a simple unheralded New York rule of court of 1921. At that time the Empire State adopted with considerable fanfare a new Civil Practice Act, supposed to include the best features of English procedure, although later experience has shown certain distressing omissions and inconsistencies.¹ The statute did not contain any provision for the summary judgment. The judges, however, in adopting rules of civil practice to supplement the Practice Act set up a rule for the purpose, Rule 113, which, as we now see, has had substantial vogue in that state and elsewhere. Perhaps that experience has some significance as to the potentialities of the rule-making process generally! The model naturally was the English rule which since the middle of the nineteenth century had provided this ready means for disposition of claims on bills of exchange and promissory notes, later extended to all but a few unusual and disfavored actions, such as fraud and libel.² It is true that New Jersey had adopted the English provision yet earlier in 1912, and Michigan has had a workable, though limited, act since 1915.³ And there were still earlier American analogies, such as the motion practice

*This paper represents a revision of an address given by the writer as part of a Continuation Legal Course on the New Minnesota Rules of Civil Procedure at the University of Minnesota on Dec. 21, 1951. It has been thought desirable to retain the general approach as one of exposition of the actual rule, both because of the original purpose of the Institute to assist the lawyers in initiation of the new procedure and because the writer has discussed these problems elsewhere so often as to make any other course repetitious. So documentation here has been kept to a minimum; general citation may be made, in addition to the articles cited in succeeding notes, to the writer's Code Pleading 556-567 (2d ed. 1947) and to his Cases on Modern Pleading 393-404, 502-528 (1952), in compilation of which Professor Charles Alan Wright of Minnesota assisted.

**United States Circuit Judge, Second Circuit; Reporter and Member, Advisory Committee on Rules of Civil Procedure, Supreme Court of the United States; former Dean, Yale Law School.

1. Some of these are discussed in Clark & Wright, *The Judicial Council and the Rule-Making Power: A Dissent and A Protest*, 1 Syracuse L. Rev. 346 (1950). And see Clark, Code Pleading 556 (2d ed. 1947), *passim*.

2. See Eng. Rules of Supreme Court, O. 3, r. 6, O. 14, O. 14A, and O. 15. For the history see Clark & Samenow, *The Summary Judgment*, 38 Yale L. J. 423 (1929); Clark, *Summary Judgments*, A.B.A. Jud. Adm. Monographs, Ser. A, No. 5, 2 F.R.D. 364, 25 J. Am. Jud. Soc'y 20 (1941), 1942 Handbk. Nat. Conf. Jud. Councils 55; for its success in England see Sunderland, *An Appraisal of English Procedure*, 9 J. Am. Jud. Soc'y 164, 166 (1926).

3. Clark & Samenow, *supra* note 2; and see *People's Wayne County Bank v. Wolverine Box Co.*, 250 Mich. 273, 230 N. W. 170 (1930).

in Virginia, which has long been a means of effective initiation of litigation by motion.⁴ Nor is there anything strange in a motion for judgment summarily entered when no defense is shown or when the defense appears to be sham or frivolous. The real step is in the means permitted to demonstrate the sham or false character of the defense, even where it might appear fair on the face of the pleading, through materials outside the pleadings, notably affidavits so particularized as to require like answering affidavits to disclose the genuineness of the issue asserted. The obvious difficulty was the constitutional right of trial by jury. When the constitutionality of the procedure was established in New York,⁵ and the success of the new innovation was ably publicized by noteworthy articles,⁶ its popularity grew and imitation followed.

After New York and New Jersey, Connecticut adopted the procedure in 1929⁷ and interesting developments occurred in states such as Wisconsin, Arizona, Colorado, and New Mexico.⁸ At the present time some thirty American states have some provision for a summary judgment.⁹ But not until the advent of the Federal Rules

4. *Chisholm v. Gilmer*, 299 U. S. 99 (1936), and references given in the Court's footnote 1; also Fowler, *Virginia Notice of Motion Procedure—A Case Study in Procedural Reform*, 24 Va. L. Rev. 711 (1938); cf. Millar, *Three American Ventures in Summary Civil Procedure*, 38 Yale L. J. 193 (1928).

5. *General Investment Co. v. Interborough Rapid Transit Co.*, 235 N. Y. 133, 139 N. E. 216 (1923); *Hanna v. Mitchell*, 202 App. Div. 504, 196 N. Y. Supp. 43 (1st Dep't 1922), *aff'd* 235 N. Y. 534, 139 N. E. 724 (1923); *Dwan v. Massarene*, 199 App. Div. 372, 192 N. Y. Supp. 577 (1st Dep't 1922); and see also *Eisele v. Raphael*, 90 N. J. L. 219, 223, 101 Atl. 200, 202 (1917); *Wittmann v. Giele*, 99 N. J. L. 478, 123 Atl. 716 (1924); *People's Wayne County Bank v. Wolverine Box Co.*, 250 Mich. 273, 230 N. W. 170 (1930); cf. *Diversey Liquidating Corp. v. Neunkirchen*, 370 Ill. 523, 19 N. E. 2d 363 (1939).

6. Among the many articles—see Clark, *Code Pleading* 558 (2d ed. 1947)—may be cited Finch, *Summary Judgments under the Civil Practice Act in New York*, 49 A. B. A. Rep. 588 (1924); Finch, *Summary Judgment Procedure*, 19 A. B. A. J. 504 (1933); McCall, *Summary Judgment under New York Rules*, 10 A. B. A. J. 22 (1924); Cohen, *Summary Judgments in the Supreme Court of New York*, 32 Col. L. Rev. 825 (1932); Saxe, *Summary Judgments in New York*, 19 Cornell L. Q. 237 (1934); and the valuable monograph, Shientag, *Summary Judgment* (1941), a revision of 4 Ford. L. Rev. 186 (1935).

7. Clark, *The New Summary Judgment Rule*, 3 Conn. B. J. 1 (1929), 15 A. B. A. J. 82 (1929).

8. As pointed out below, the Wisconsin experience would seem particularly helpful to Minnesota lawyers. See Boesel, *Summary Judgment Procedure*, 6 Wis. L. Rev. 5 (1930); Ritter & Magnuson, *The Motion for Summary Judgment and Its Extension to All Classes of Actions*, 21 Marq. L. Rev. 33 (1936); Young, [1944] Wis. L. Rev. 141, 161, 162; Solie, [1947] Wis. L. Rev. 422.

9. Vanderbilt, *Minimum Standards of Judicial Administration* 219, 220 (1949) lists 28 American jurisdictions; since the publication of this book, Utah and Minnesota have adopted the Federal Rules.

of Civil Procedure was there any general movement for a broad and inclusive type of rule; thus such a state as Texas, on revision of its procedure, omitted any provision for it.¹⁰ The Federal Rules, however, set forth a new and improved form which has been accepted, along with the other federal provisions, in that considerable bloc of states now following that practice, including as of most recent date New Jersey and Utah and, just lately, Minnesota.¹¹ The striking difference between the federal rule and previous models is that the procedure is available in any civil action. Though in New York and elsewhere the category of actions wherein the summary judgment was an available remedy has been greatly extended, it is still true in those jurisdictions that it can be had only in the actions named and designated in the rule or statute.¹² But when we came to the drafting of the Federal Rules, we found a considerable view that these limitations were not justified in themselves and led to confusion and waste in determining their application.¹³ So the shackles were stricken off and the states have followed this lead. Thus New Jersey, which had had the restricted rule, substituted the more general rule in its adoption of federal procedure in 1948.¹⁴ And so you in Minnesota in your new procedure will have no preliminary question of deciding whether the particular action is itself for a "liquidated demand" or some other designated type of claim. You need only apply the provisions of the rule itself, Federal and

10. Its omission was deplored in Suggs & Stumberg, *Summary Judgment Procedure*, 22 Tex. L. Rev. 433 (1944), and Clark, *The Texas and the Federal Rules of Civil Procedure*, 20 Tex. L. Rev. 4, 10 (1941). See McDonald, *Summary Judgments*, 30 Tex. L. Rev. 285 (1952), discussing in some detail the adoption in 1950 of Rule 166-A, 148 Tex. 607, 612, following the original F.R. 56.

11. For the states following the Federal Rules see Clark, *Cases on Modern Pleading* 24 (1952); Clark, *The Federal Rules in State Practice*, 23 Rocky Mt. L. Rev. 520 (1951); and Clark, *Code Pleading and Practice Today*, in David Dudley Field Centenary Essays 55, 67-70 (1949).

12. See discussion of "debt or liquidated demand" in *Waxman v. Williamson*, 256 N. Y. 117, 175 N. E. 534 (1931), also *Norwood Morris Plan Co. v. McCarthy*, 295 Mass. 597, 4 N. E. 2d 450 (1936). When in New York the motion was made available to defendants as to defenses, it was ruled that defendants were not limited to the actions specified in the rule, as are plaintiffs. *Lederer v. Wise Shoe Co.*, 276 N. Y. 459, 12 N. E. 2d 544 (1938), a view confirmed by a 1944 amendment to N. Y. Civ. Prac. Rule 113.

13. See Committee Notes to F.R. 56 and to Minnesota Rules of Civil Procedure for the District Courts, Rule 56 (Tent. Draft 1950); Ritter & Magnuson, *supra* note 8; Clark, *supra* note 2; N. Y. Com. on the Administration of Justice 287 (1934); Third Rep. N. Y. Jud. Council 30 (1937); also Pike & Willis, *The New Federal Deposition-Discovery Procedure*, 38 Col. L. Rev. 1436, 1455-1458 (1938).

14. N. J. Rules Civ. Prac. Rule 3:56 (1948), in place of the former rule quoted and applied as in *Nolte v. Nannino*, 107 N. J. L. 462, 154 Atl. 831 (1931). Wis. Stat. § 270.635(2) and (7) (1949) authorizes summary judgment on motion of either plaintiff or defendant in any civil action.

Minnesota Rule 56. Let us turn to that rule and consider it first in its various parts and then in its setting along with the other pre-trial devices.

Subd. (a) of the Federal Rule or .01 of your rule is entitled "For Claimant" and provides for the motion by one claiming a judgment, that is, a plaintiff, or a counter- or cross-claimant. The second subdivision, (b) or .02, is entitled "For Defending Party" and provides for a motion by the party opposing the grant of relief. A main reason for the separate statement is to make clear and precise the use of the motion by any party. As we have seen, the procedure grew as a *plaintiff's* or claimant's motion; and some jurisdictions have even added separate motions, as time went on, to care for defensive judgments.¹⁵ The federal form, however, makes clear the inclusive nature of the remedy as to both parties and claims or defenses. A subordinate reason for the separation is the slight distinction in time when the motions are available in order to provide for some protection to a defendant against too hasty a claim for judgment by a plaintiff. So a defending party may move at any time, whereas a claimant may not move before twenty days after the commencement of the action (the time normally given for answer) or after the adverse party has moved for judgment. Very likely this shows an excess of caution; thus a distinguished member of our Advisory Committee made an offer—as yet unaccepted—to eat his trousers if anyone could ever show any precipitate action in any lawsuit to offset the more usual interminable delays. But at any rate the protection is here. The rule also provides that a party may "move with or without supporting affidavits," a grant of flexibility to include the old demurrer or motion on the face of the pleadings about which I shall have something to say later.

An interesting question has arisen whether a summary judgment may be entered against a moving party in the absence of formal motion by his opponent. In the cases where no sharp dispute on the facts is uncovered, determination of the case may well turn upon adjudication of a serious issue of law. When both parties have moved for summary judgment, the issue is of course clearly presented for final disposition. But this course may seem so obviously indicated to a party opposing a motion that he may fail or neglect to present a formal motion. Here the Advisory Committee

15. Compare the separate motions in New York for setting up specified defenses to the complaint or answer by supporting affidavits, N. Y. Civ. Prac. Rules 108, 110, and the extension of the original Rule 113 by amendment as noted in note 12 *supra*.

hesitated to authorize such a judgment without formal request therefor and has left what I fear is an ambiguity and a slight leaning toward formality, such as has now been avoided in New York and Wisconsin.¹⁶ As yet there is no authoritative federal decision, although the trend of rulings in the district courts is to hold the formal motion here unnecessary.¹⁷ This is an instance where, seemingly, the judges on the firing line have reached a better result than that suggested by inhibitions of the drafting committee. Perhaps a like result may come from your own judges in the active arena with respect to the troubles of your committee, so vividly described to us by Chairman Youngquist, in trying to restrict the meaning of "transaction" in the counterclaim Rule 13 and suggesting a limitation on its operation which, in my humble judgment, is both inoperable and undesirable!¹⁸

Next we turn to subd. (c) or .03, which is the vital heart of the rule. The first two sentences deal only with matters of time and detail. But the third sentence states the fundamental and guiding principle: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The touchstone thus is the absence of a *genuine* issue as to a *material* fact. These are very carefully chosen words intended to express a very definite thought. Various courts have attempted to better this formula by others which tend to bend the principle to their ideas of policy—with deleterious results, as I shall point out later. But note, too, that the judge is to apply this principle after examining everything before him in the file: pleadings, affidavits, depositions, or admissions. This is important. He takes the case as it actually is shown to be, not as the formal allegations of a pleading may have embodied a pleader's hope. On the other hand, the absence of affidavits or like material does not prevent the judge-

16. N. Y. Civ. Prac. Rule 113 as amended in 1944; Wis. Stat. §270.635 (3) (1949).

17. The federal cases are collected in Clark, Cases on Modern Pleading 514, n. 13 (1952).

18. The reference is to the recent amendment striking the word "contract" from Rule 13.01 as to compulsory counterclaims and "contract" or "occurrence" from Rule 13.02 as to permissive counterclaims. The hope appears to be that the word "transaction" now left in the rule will be narrowly construed; but why the successful and desirable federal procedure, avoiding duplicating litigation in such a critical field as, for instance, that of the automobile accident, should be either cut back or confused is hard to understand. Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 Minn. L. Rev. 580, 587-591 (1952).

ment if it seems indicated as a matter of law.¹⁹ Thus the remedy may serve the functions both of the old demurrer and of other more modern pre-trial objections also, a point developed below. A final sentence here provides: "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." This was added to the federal rule by amendment effective in 1948 to avoid the unfortunate result found necessary under the earlier rule in *Sartor v. Arkansas Natural Gas Corporation*,²⁰ of denial of all summary judgment when the only contested issue was as to the amount of the damages.²¹

The next subdivision, (d) or .04, is important as exemplifying what can be properly termed the discovery or pre-trial aspects of the rule. It provides that if a judgment is not rendered upon the whole case and a trial is necessary, the court nevertheless, by examining the pleadings and the evidence before it and by interrogating counsel, "shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." It then should enter an order specifying the facts that are without substantial controversy and directing the further proceedings in the case. This is in substance a pre-trial order of the same form as that provided for in the pre-trial rule itself, Rule 16. This workable procedure demonstrates how closely this rule is tied in spirit and in fact to the other pre-trial devices.²²

The remaining three subdivisions of the rule round out the process by specific directions as to certain important matters of detail. Subd. (e) or .05 deals with the form of the supporting and opposing affidavits which must be made on personal knowledge, must set forth "such facts as would be admissible in evidence," and must show affirmatively that the affiant "is competent to testify to the matters stated therein." Provision is also made for supplemental or further affidavits or opposing depositions, as the court may permit. Subd. (f) or .06 provides for refusal or continuance of the case when a party shows that he cannot then present essential facts; the

19. See *Dunn v. J. P. Stevens & Co.*, 192 F. 2d 854 (2d Cir. 1951), and cases there cited.

20. 321 U. S. 620 (1948).

21. See Commentary, *Summary Judgment as to Damages*, 7 Fed. Rules Serv. 974; Advisory Committee's Note to amendment to F. R. 56(c).

22. Detailed references to the pre-trial procedure, with citations to illustrative material, are given in Clark, *Cases on Modern Pleading* 529-544 (1952); materials on discovery appear at *id.* 465-501.

continuance may be for the obtaining of further affidavits or the taking of depositions or the securing of discovery. And subd. (g) or .07 provides various penalties, including expenses, attorney's fees, and contempt orders, for affidavits presented in bad faith or solely for the purpose of delay.

What are the uses to which the new remedy may be devoted? They are many, including all the old methods of pre-trial attack covered by such devices as the demurrer or the motion for judgment on the pleadings and the newer "speaking" motion so called. In fact they will include everything except motions aimed directly at perfecting or improving the pleadings. These are no longer necessary because the summary judgment searches for the merits irrespective of the pleadings. Of course the motion may lead incidentally to pleading amendments when it suggests or results in further proceedings in the case, including trial; but such improvement of detail is more a by-product than a main objective, as is the case throughout modern pleading. Its obvious use to determine questions of law, as on the old demurrer, is perhaps not so immediately interesting as its use in settling certain issues of fact, or as a "speaking" motion.

The use of this name brings up some history and helps to place this new procedure against the background of the past. At common law the old demurrer was limited strictly to presenting an issue of law. Thus it was held to admit all the opposing allegations of fact and to say that even so there was no legal right. The fetish of the common law to obtain a single clear-cut issue—of fact by allegation and traverse, of law by allegation and demurrer—thus did not admit of mixing law and facts; in consequence the demurrer had a rigidity and a limited usefulness which made it an ineffective instrument in all except the most clear-cut cases of absence of legal right. But the common-law rule prohibiting a "speaking" demurrer, i.e., one which spoke or made assertions of fact itself, was quite absolute.²³ The summary judgment is obviously utterly at variance with this conception. Under the Federal Rules the most direct counterpart for the old demurrer is the motion for judgment under Rule 12(b), particularly when based upon the ground of "failure to state a claim upon which relief can be granted." Upon the adoption of the rules a question soon arose as to whether this motion could be supported by facts outside the pleadings or whether it was

23. Clark, *Code Pleading* 514 (2d ed. 1947); Committee's Note to Minn. Rule 12.03 (Tent. Draft 1950), citing Pirsig's *Dunnell on Minn. Pleading* §1657.

as strictly limited as the demurrer. Some division occurred in the cases, but the majority came to accept the idea of the "speaking motion," holding it more within the spirit of the new system and viewing resort only to Rule 56 as an unwarranted technicality.²⁴

This in substance is the position taken by the Federal Advisory Committee in recommending amendments to clarify the rules—amendments effective March 19, 1948. But it went further and canalized the procedure within rather clear-cut limits which precisely determine the interrelation of this and the summary judgment rule. And since Minnesota has quite properly accepted the amended form of the rules, it is necessary to explain this interconnection. It is true that the writer, as Reporter to the Advisory Committee, originally recommended what he hoped would be a simpler procedure whereby the motion for summary judgment would swallow all other motions and become the one single form for making all objections in advance of the answer.²⁵ But the Advisory Committee decided otherwise, a decision of policy with which he has no serious quarrel. For it is often true that accepting as a procedural principle what seems on the surface to be broad, flexible, and simple actually defeats its own end as it leaves the bench and bar without apparent guide. Then procedural inhibitions of the past come into play to make only the ancient practice seem the sure and safe way. Consequently the sharply marked course, however narrow, may be the one most used.²⁶

At any rate the additions by amendment are definite in their grant of power. They appear in the provision as to stating defenses of Rule 12, subd. (b) or .02, and in that as to the motion for judgment on the pleadings of subd. (c) or .03. Thus the second subdivision provides that if on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted—the ancient "failure to state a cause of action"—matters outside the pleading are presented to and not excluded by the court, "the motion shall be treated as one for summary judgment" under Rule 56 and so disposed of, with all the consequences as well as protections

24. See, e.g., *Gallup v. Caldwell*, 120 F. 2d 90, 92-93 (3d Cir. 1941), and other cases cited in Advisory Committee's Note to amendment to F. R. 12(b); Clark, *Code Pleading* 540-544 (2d ed. 1947); 2 Moore, *Federal Practice* §12.09 (2d ed. 1948).

25. See Clark, *Simplified Pleading*, A.B.A. Jud. Adm. Monographs, Ser. A, No. 18, 2 F.R.D. 456, 464-465, 27 Iowa L. Rev. 272 (1942), 1942 Handbk. Nat. Conf. Jud. Councils 136.

26. The detailed rules for deposition and discovery are an illustration. See Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 Vand. L. Rev. 493 (1950).

afforded by the rule. The provisions of subd. (c) or .03 are similar. What happens is that reliance by either party to any "speaking" materials, i.e., affidavits, depositions, admissions, or stipulations, will immediately transform a motion initially based merely on the formal pleadings into one for summary judgment on the merits unless the judge affirmatively prevents. Actually, of course, as the federal experience is demonstrating, no judge will wish to shut his eyes to informative material on file unless there is some good reason in the particular case, such as interminable delays or evasions of a party or the existence of a decisive question of law making further search of the record unnecessary. In practice, therefore, the pleading motion becomes one on the merits.²⁷

As the federal experience shows, the importance of this transformation is great. It not only avoids successive duplicating motions first of form and then of substance, with fierce shadow battles as to which is to be employed; it also shifts the whole emphasis from the niceties of pleading or the perfecting of the proper paper documents to a discriminating search for the merits. Naturally such a direction to the proceedings is often more of a boon to the pleader than to the movant for judgment; for it is well settled that judgment is to be denied if merit is disclosed even though the pleadings be formally inadequate. Of course, they may then be amended or even treated as amended without formal documents under the provisions for amendments to conform to the evidence of Rule 15(b).²⁸

Perhaps no other provision quite so strikingly emphasizes the crowning spirit of the rules as does this important Rule 12 in its present form. It demonstrates that the merits must always control and direct the course of the proceedings; the pleadings must remain a definite adjunct, subordinate in character, to that main objective.²⁹ The limitation of the new provision to the defense of failure to state

27. See, e.g., *William J. Kelly Co. v. Reconstruction Finance Corp.*, 172 F. 2d 865 (1st Cir. 1949); *Allison v. Mackey*, 188 F. 2d 983 (D.C. Cir. 1951); *Suckow Borax Mines Consolidated v. Borax Consolidated, Ltd.*, 185 F. 2d 196 (9th Cir. 1950), *cert. denied*, 340 U. S. 943 (1951); cf. *Moffett v. Commerce Trust Co.*, 187 F. 2d 242 (8th Cir.), *cert. denied*, 342 U. S. 818 (1951); *Clark, Experience under the Amendments to the Federal Rules of Civil Procedure*, in *Federal Rules of Civil Procedure and New Title 28, U. S. Code Judiciary and Judicial Procedure* 1, 6, 14, 24 (1952 Rev. ed.).

28. See, e.g., *Callaway v. Hamilton Nat. Bank of Washington*, 195 F. 2d 556 (D.C. Cir. 1952); *Gruen Watch Co. v. Artists Alliance*, 191 F. 2d 700 (9th Cir. 1951); *Pacific American Fisheries v. Mullaney*, 191 F. 2d 137 (9th Cir. 1951); *Chappell v. Goltsman*, 186 F. 2d 215 (5th Cir. 1950); *Dioguardi v. Durning*, 139 F. 2d 774 (2d Cir. 1944).

29. See discussion in *Clark, supra* note 25; and see also *Clark, Cases on Modern Pleading* 371-378, 393-404 (1952).

a claim is not at variance with this or formidable in itself. It was done because the manner of settling issues as to the jurisdiction of the court or service of process has long been well settled and should not be disturbed. In the federal system the practice has been to use affidavits here too.³⁰

Two further interrelated or contrasted matters remain for consideration: the use of the summary motion as an instrument of discovery and the fear of trial by affidavits. These are important because they have to do with the practical use which may be made of the motion beyond the limits set by the old demurrer for questions of law. Some appellate judges have expressed substantial fear of the potentially wide scope of the motion and have gone so far as to demand the denial where there is the "slightest doubt" as to the facts.³¹ This easy cliché has tended then to be accepted by trial judges as a substitute for the carefully chosen formula of the rule, justifying a preemptory denial of all motions not based on issues of law. There is no denying that in certain localities the use of the remedy has been much restricted by such a course of precedents;³² in others, however, there has been a closer approach to a sound state practice such as that of Wisconsin, where the remedy seems to have been reasonably effective.³³ And the Judicial Conference of the United States has called attention to the value of the "related provisions" of the discovery and summary judgment rules, and urged the promotion of their use by the district judges.³⁴ One now senses some amelioration of the opposition for a time stated by

30. Fed. Form 19; 2 Moore, Federal Practice ¶12.09, n. 8 (2d ed. 1948). Cf. *Riley v. Titus*, 190 F. 2d 653 (D.C. Cir.), cert. denied, 342 U. S. 855 (1951); *Nash-Kelvinator Corp. v. California Refrigerator Repair Shop*, 11 F. R. D. 313 (S.D. Cal. 1950). The limitation appears only in subd. .02, and not in .03, the motion for judgment on the pleadings.

31. *Arnstein v. Porter*, 154 F. 2d 464 (2d Cir. 1946); *Doehler Metal Furniture Co. v. United States*, 149 F. 2d 130 (2d Cir. 1945); *Peckham v. Ronrico Corp.*, 171 F. 2d 653, 657 (1st Cir. 1948); *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213 (8th Cir. 1951).

32. This judicial attitude has called forth much critical discussion. See, e.g., Melville, *Summary Judgment and Discovery: The Amended Rules Will Add to Their Usefulness*, 34 A. B. A. J. 187 (1948); *Scope of Summary Judgment under Federal Rules of Civil Procedure*, 55 Yale L. J. 810 (1946); *Factors Affecting the Grant or Denial of Summary Judgment*, 48 Col. L. Rev. 780 (1948); Kennedy, *The Federal Summary Judgment Rule—Some Recent Developments*, 13 Brooklyn L. Rev. 5 (1947); Branda, *Summary Judgment in the Federal Courts*, 99 U. of Pa. L. Rev. 212 (1950); Locke, *Summary Judgment*, 25 Wash. L. Rev. 71 (1950); 33 A. B. A. J. 1111, 1112 (1947); 45 Col. L. Rev. 964 (1945); 61 Harv. L. Rev. 375 (1948); Clark, *supra* note 26.

33. See note 8 *supra*.

34. Rep. Jud. Conf. of the U. S. 36, 37 (Sept. 1948).

appellate judges.³⁵ There is nevertheless danger in the operation of that Gresham's Law of Procedural Precedents whereby the technical drives out the liberal rule. There is little for a judge to say in making or affirming a permissive ruling—only when he holds this course to be error does he tend to the luxury of profound and quotable restrictions which ripple ever more broadly in later precedents to confound the practice of the future.³⁶ Judges should remember how easy it is thus to freeze the procedure of the future and should therefore eschew any propensity to announce fundamental precepts as a basis for practice decisions.

The use of the motion as an adjunct of discovery of course occurs when the movant clearly and precisely discloses his case in the affidavits to which he seeks reply from his opponent. The intention of the rule is that the person addressed must repel the attack by equally precise disclosure of the merits of his case. As said in one case where an insurance claimant declines to disclose medical testimony in advance of trial: "But the history of the development of this procedure shows that it is intended to permit 'a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried.'"³⁷ And summary judgment was affirmed against a litigant who relied on a claim of "privileged communication" to hold back his intended proof until he could get to trial. This principle has since been successively affirmed notwithstanding the expressed fear of trial by affidavits and may be considered as settled federal law.³⁸

35. Note particularly cases such as are cited in note 38 *infra*. Others appear in late issues of the Federal Rules Service under Rule 56(c). See, e.g., *Park-in-Theatres v. Perkins*, 190 F. 2d 137 (9th Cir. 1951) (patent infringement); *Ricker v. General Electric Co.*, 162 F. 2d 141 (2d Cir. 1947) (plagiarism); *Griffin v. Griffin*, 327 U. S. 220, 235 (1946) (fraud); *Dixon v. American Telephone & Telegraph Co.*, 159 F. 2d 863 (2d Cir.), *cert. denied*, 332 U. S. 764 (1947) (same); *De Luca v. Atlantic Refining Co.*, 176 F. 2d 421 (2d Cir. 1949), *cert. denied*, 338 U. S. 943 (1950); *Petrie v. Roberts*, 242 Wis. 539, 8 N. W. 2d 355 (1943). Of course the reports show many denials or reversals of summary judgments; thus see 3 Barron & Holtzoff, *Federal Practice and Procedure* 131-174 (1950).

36. See discussion in Clark, *supra* note 26, at 497-498; Clark, *supra* note 27, at 23-24.

37. *Engl v. Aetna Life Ins. Co.*, 139 F. 2d 469, 472 (2d Cir. 1943).

38. As in, e.g., *Brooks v. Pennsylvania R. Co.*, 187 F. 2d 869 (2d Cir. 1951); *Compania de Remorque y Salvamento, S.A. v. Esperance, Inc.*, 187 F. 2d 114 (2d Cir. 1951); *Forde v. United States*, 189 F. 2d 727 (1st Cir. 1951); *Hisel v. Chrysler Corp.*, 94 F. Supp. 996 (W.D. Mo. 1951). See also *Foster v. General Motors Corp.*, 191 F. 2d 907 (7th Cir. 1951); *Brensinger v. Margaret Ann Super Markets*, 192 F. 2d 458 (5th Cir. 1951); *Orvis v. Brickman*, F. 2d (D.C. Cir. 1952); *Machado v. McGrath*, 193 F. 2d

It is obvious that judges should be careful not to grant judgment against one who shows a genuine issue as to a material fact. Just as obvious is the obligation to examine a case with care to see that a trial is not forced upon a litigant by one with no case at all. The very freedom permitted by the simplified pleadings of the modern practice is subject to abuse unless it is checked by the devices looking to the summary disclosure of the merits if the case is to continue to trial. Those are discovery, summary judgment, and pre-trial—all necessary correlatives of each other and of a system which may permit concealment of the weakness of a case in the generalized pleadings of the present day. Refusal of summary disposal of the case may be a real hardship on the more deserving of the litigants; since appeal does not lie from refusal, as it does from the grant,³⁹ the penalties may be the severer. A court has failed in granting justice when it forces a party to an expensive trial of several weeks' duration to meet purely formal allegations without substance fully as much as when it improperly refuses to hear a case at all.⁴⁰

There is no desire to minimize the problem before the courts, trial as well as appellate. Involved may well be all the delicate balancing of interests so much a part of the judge's function and responsibility. Of course, too, he is considering the entry of a definitive final judgment, which will become *res judicata* in a way the demurrer in itself never was,⁴¹ although the procedures for reopening judgments are not difficult and are often resorted to where new light can properly be offered.⁴² Nor is decision easier

706 (D.C. Cir. 1951); *Stanaland v. Atlantic Coast Line R. Co.*, 192 F. 2d 432 (5th Cir. 1951); *Albert Dickinson Co. v. Mellos Peanut Co. of Illinois*, 179 F. 2d 265 (7th Cir. 1950).

39. *McGrath v. Hunt, Hill & Betts*, 194 F. 2d 529 (2d Cir. 1952); *Morgenstern Chemical Co. v. Schering Corp.*, 181 F. 2d 160, 161 (3d Cir. 1950); *Jetco, Inc. v. Jiffy Products Co.*, 192 F. 2d 852 (9th Cir. 1951).

40. See, *e.g.*, the later history of *Arnstein v. Porter*, 154 F. 2d 464 (2d Cir. 1946), in 158 F. 2d 795 (2d Cir. 1946), *cert. denied*, 330 U. S. 851 (1947), finally terminating what is termed "one of the most absurd plagiarism suits on record" by Sigmund Spaeth in *A History of Popular Music* 553 (1948); or the full history of the suit concerning the novel "Rebecca," *MacDonald v. Du Maurier*, 144 F. 2d 696 (2d Cir. 1944), 75 F. Supp. 653 (S.D. N.Y. 1946), 75 F. Supp. 655 (S.D. N.Y. 1948), with appeal abandoned after an order for an increased bond for costs. *Clark, Cases on Modern Pleading* 525, 526 (1952).

41. *Stokke v. Southern Pac. Co.*, 169 F. 2d 42 (10th Cir. 1948). For the older rule on demurrer see *Clark, Code Pleading* 527-529 (2d ed. 1947); *Keljikian v. Star Brewing Co.*, 303 Mass. 53, 20 N. E. 2d 465 (1939); 34 *Yale L. J.* 905 (1925).

42. As provided in F. R. 60; see, *e.g.*, *Markert v. Swift & Co.*, 173 F. 2d 517, 519 (2d Cir. 1949); *Kelly v. Delaware River Joint Commission*, 187 F. 2d 93 (3d Cir.), *cert. denied*, 342 U. S. 812 (1951); *Tozer v. Charles A.*

than other serious problems facing a judge. Even such a suggestive and at times fruitful analogy as that of the motion for a directed verdict after a trial is not a rule of thumb, as is shown by the two opposing opinions of the Supreme Court in *Sartor v. Arkansas Natural Gas Corporation*.⁴³ What is needed is the application of common sense, good judgment, and decisive action, on the one hand, not to shut a deserving litigant from his trial and, on the other, not to allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial. Formulas or clichés will not help, and the announcement of rolling precedents will only embarrass in the future.

Properly and responsibly applied, therefore, the summary judgment procedure is an important and necessary part of the series of devices designed for the swift uncovering of the merits and either their effective immediate disposition or their advancement toward prompt resolution by trial.

Krause Milling Co., 189 F. 2d 242 (3d Cir. 1951); *United States v. Newbury Mfg. Co.*, 123 F. 2d 453 (1st Cir. 1941); *Klapprott v. United States*, 335 U. S. 601 (1949); *cf. Butler v. Ungerleider*, 187 F. 2d 238 (2d Cir. 1951); *id.* at 101 F. Supp. 379 (E.D. N.Y. 1951).

43. 321 U. S. 620, 624, 629 (1944); *cf. note 21 supra*.